# Licences granted to electricity producers are not subject to transfer and stamp duty

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*Judgment in appeal no. 1170/2014 of the Supreme Court (Judicial Review Division, Second Chamber) of 17 February 2016 has stated that licences granted to companies so as to provide basic services of general interest - in this case, the production of electricity through wind facilities - are not subject to transfer and stamp duty*

## 1. Background

Judgment in appeal no. 1170/2014 of the Supreme Court (Judicial Review Division, Second Chamber) of 17 February 2016 does not uphold an appeal against the judgment of the High Court of Galicia, which quashed a decision of the Galician Treasury requiring, from a company licensed to produce electricity with wind farms, payment of 912,013.35 euros, including 132,916.12 euros in late payment interest, as settlement of the Spanish Transfer and Stamp Duty (under the category of asset transfers for good and valuable consideration) and without prejudice to the initiation of tax-default penalty proceedings.

## 2. Nature of the administrative licence to operate wind farms

The judgment under review examines whether the provision of a service of production and supply of electricity is subject to the Transfer and Stamp Duty (abbrev. ITPAJD) even where not in the form of an administrative concession. The licence in question was granted under the Electricity Sector Act 54/1997 of 27 November, which as the EU directives it transposes, characterises the supply of electricity as a basic service of general interest provided under rules of free competition. In the model designed by the European Union there are obvious misgivings with the notion of public service, so Act 54/1997 goes for a change of characterisation that replaces that of basic public service.

An immediate legal effect of the new characterisation is the non-publicness of the service. Because of the basic nature of power supply, the Administration retains significant powers of regulation and control over the production and marketing of electricity, but public authorities are no longer the owners of the service and, as such, the granting of licenses to private undertakings so as to engage in liberalised activities does not involve the transfer of powers relating to the ownership or management of the service.

From a tax perspective, moving from a characterisation of publicly-owned public service to one of basic services of general interest means that the licence for facilities that produce electricity cannot be characterised either as an administrative concession or as an act of similar nature. Administrative control over the provision of a basic activity, as is the supply of electricity, does not make such activity, at least from a tax standpoint, a public service, neither subjectively (ownership of the service is not public) nor objectively (the Administration

does not intervene, directly or indirectly, in the management of the service). The Administration is involved in regulation and control by way of licensing, specifically in the issue of 'operating licences'.

The service provider is not granted public-service management powers, nor is there a shift of assets to the undertaking licensed to produce electricity.

Art. 13(1) and (2) of Royal Legislative Decree 1/1993, approving the recast text of the Transfer and Stamp Duty Act, refers to circumstances where administrative concessions and acts that should be likened to the same are subject to ITPAJD. To determine whether the act or contract is subject to taxation (equatable with the concession) the requirement of shift of assets is fundamental because the tax is levied on transfers of property and rights, so that to conclude that the taxable event has taken place there must be a transfer of a right, in this case from the Administration to the private party. And this event is missing in the licence under examination: there is no shift of ownership powers (the land where the licensed undertaking would carry on business is privately owned) and there is no type of transfer of public powers as the concerned activity and service are not publicly-owned since Act 54/1997. The Supreme Court concludes that the elements of the taxable event described in said article do not apply and, thus, the licence is not subject to tax.

In response to the contention of the appellant Administration that with non-publicness the notion or concept of public service has not disappeared and that the only thing that changes is the method of managing the same, regardless of the ownership of the service or activity, the Supreme Court denies that administrative control through licensing turns such activity into a kind of "indirect public service", stressing that in sectors such as that of electricity - as with the taxi or pharmaceutical industries - it is not that a change occurs in the method of management, but that private undertakings directly take on the activity. It no longer involves a publicly-owned public service where management is embodied in one of the forms contained in art. 277 of Royal Legislative Decree 3/2011, of 14 November, approving the recast text of the Public-Sector Contracts Act, which clearly sets out the ways that the government can manage public services: either directly by the Administration itself or indirectly through any of the methods of procurement provided therein (concession, profit-sharing, arrangement with natural or legal person who has been delivering services similar to the public service in question and quasi-public corporation). None of these forms apply to electricity production and supply activities carried out in a system of free enterprise.

## 3. Has the case law principle changed?

Some headlines of the financial press note that this judgment means a change of case law principle since the Supreme Court parts ways with the approach taken in its judgments of 7 February 2013 (casa.3030/2010) of 23 September 2013 (casa. 1856/2012) and 18 June 2010. However, based on the legal basis of the judgment under review, strictly speaking there has been no change of case law principles. The pronouncements are different because the governing law is different too. The judgments discussed the liability to ITPAJD of licences granted under the old Electricity Sector Act 40/1994 of 30 December, under which the supply and production of electricity were defined as publicly-owned public services (cf. art. 2(1)) and, correspondingly, the license to the production plants contained a transfer of publicly-held powers triggering the taxable event of ITPAJD (under the category of asset transfers for good and valuable consideration).

Actually, there has not been a change of case law principle, but a change of legislation and, correspondingly, of characterisation of the supply of electricity (art. 2(1) of Act 54/1997 vs. art. 2(1) of Act 44/1994). The difference between the reply given in 2013 and in 2016 is owing to the characterisation of the supply of electricity as a service of general interest and not as a public service.

## 4. Conclusions

In short, licensing of facilities producing electricity under Act 54/1997 is not subject to ITPAJD for the following reasons:

1) The fact that an activity or course of action of a private party is subject to administrative control does not mean that said activity or course of action constitutes a public service. In addition, wind power generation is a production-related activity

and never a service-related activity; i.e., it is not a service and obviously such is not provided.

2) The requirements of the tax's legislation to equate the licence granted to the respondent party with a concession for the purposes of taxation under the aforementioned tax are not met. It is obvious that in the case on trial there is no assignment or use of publicly-owned property since the plots or land where the wind power generation activity is established or carried out are privately owned. Nor have powers of management of a public service been granted, since the Administration has never performed this activity and, under the Electricity Sector Act 54/1997, it is no longer a publicly-owned public service. Lastly, if the Administration is not the owner of the service, does not manage it, either directly or indirectly, then there is no shift of assets from said Administration to the company.

   The Supreme Court admits that the concept of concession from the point of view of taxation does not match that of the administration inasmuch as the latter include certain licences, but notes that "in order for the duty to apply to this type of legal construct, there must be a transfer of a right that can be assessed economically, and given in turn the difficulty of detecting the monetary value of said licence, such transfer of monetary value must be concluded from at least the existence of valuable consideration for the Administration, ultimately representing the monetary measure and tax determination of the transferred right, circumstances that, [...], are not apparent in this case".

## 5. Impact of the judgment on third-party positions

Two consequences of enormous significance for companies engaged in the activity of production and sale of electricity emerge from the doctrine of this judgment:

1) From now on, no settlement of ITPAJD (under the category of asset transfers for good and valuable consideration) for licensing of facilities producing electricity (wind, solar ...) applies.

2) Those companies that have had production facilities licensed under Act 54/1997 or Act 24/2013 may claim from the competent tax authorities a refund of the amounts paid in respect of ITPAJD (under the category of asset transfers for good and valuable consideration) in accordance with the terms of tax legislation. However, reliance on this judgment will not suffice as it has been given with regards to a specific settlement without quashing any legal provision. New proceedings must be initiated to leave the appropriate settlement without effect.